

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ARCH CHEMICALS, INC.,)	
a Virginia corporation,)	
)	No. 07-1339-HU
Plaintiff,)	
)	
v.)	
)	OPINION AND ORDER
)	
RADIATOR SPECIALTY COMPANY,)	
a North Carolina corporation,)	
)	
Defendant.)	
_____)	

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8 HUBEL, Magistrate Judge:

9 This is an action by Arch Chemicals, Inc. (Arch) against
10 Radiator Specialty Company (RSC), asserting claims for common law
11 indemnity and contribution. Arch seeks recovery of amounts paid in
12 settlement of a lawsuit against Arch brought by members of the
13 Davidson family. Before the court are three motions, Defendant's
14 Motion to Dismiss Contribution and Indemnity Claims (doc. # 88);
15 Defendant's Motion to Add Lexington Insurance as a Plaintiff and
16 Strike Ratification (doc. # 91); and Defendant's Motion for Leave
17 to Amend Answer and Affirmative Defenses (doc. # 95). The three
18 motions present two issues. The first is whether Arch is precluded
19 from claiming contribution from RSC for any settlement amounts that
20 reflected Arch's exposure to punitive damages. The second is
21 whether Arch's liability insurer, Lexington Insurance Company
22 (Lexington) is a real party in interest that should be joined as a
23 plaintiff in this action or whether a ratification executed by
24 Lexington defeats RSC's efforts to join Lexington as a plaintiff.

25 **Factual Background**

26 This case arises out of the wrongful death and bodily injury
27 claims brought by the Davidson family against Arch, the
28 manufacturer of a swimming pool product containing calcium
hypo-chloride (CalHypo) called Sock-It. In June 2002, the Davidsons'

1 car, which had Sock-It in the cargo compartment, caught fire. The
2 parents and one child were severely injured and the other two
3 children died.

4 The original complaint, filed by the three surviving members
5 of the Davidson family on April 20, 2004, asserted claims against
6 Arch and other defendants. Xochihua Declaration, Exhibit A. The
7 claims did not include a prayer for punitive damages; Oregon law
8 prohibits pleading punitive damages unless, upon hearing, the trial
9 court allows the plaintiff to amend the complaint to assert such a
10 claim. Or. Rev. Stat. § 31.725. After such a hearing in the
11 Davidson case, plaintiffs were given leave by the court to pursue
12 punitive damages against Arch only. Xochihua Declaration, Exhibit
13 D. On June 14, 2006, the Davidsons filed an amended complaint with
14 a prayer for \$200 million in punitive damages, as well as varying
15 amounts of economic damages and \$40 million in noneconomic damages
16 for each plaintiff and for the estates of the two decedents.
17 Plaintiff's Response to Defendant's Motion to Dismiss, Exhibit A;
18 Xochihua Declaration Exhibit H (Amended Complaint). The allegations
19 of the Amended Complaint pertinent to the issue of punitive damages
20 against Arch are as follows:

21 For many years, and up to the present time, the Arch/Olin
22 Defendants have manufactured and sold "Sock It" and other
23 similar calcium hypochlorite products with high
24 percentages of available chlorine, packaged in plastic
25 pouches. These actions were taken with knowledge that the
26 products were inherently unsafe and likely to cause
27 potentially catastrophic fires, unexpected by the
consumers, that could cause devastating injury or death
to such consumers, including these Plaintiffs. Such acts
were taken with conscious and reckless disregard of these
risks to consumers, and with knowledge that safer
products and packaging were available and feasible, but

1 potentially more expensive. These Defendants also sought
2 to conceal the true risks of their products from the
3 public, further enhancing the risk of catastrophic injury
4 or death. Such facts and circumstances entitle the
5 Plaintiffs to an award of punitive damages in a
6 reasonable amount not to exceed \$200,000,000.

7 Id. at ¶ 15.

8 In December 2006, Arch settled with the Davidsons pursuant to
9 a confidential Revised Settlement Agreement (Settlement Agreement),
10 which has been filed under seal. Xochihua Declaration Exhibit B.
11 The Settlement Agreement released all claims against Arch, but did
12 not explicitly mention punitive damages or segregate them from
13 compensatory damages. However, the Settlement Agreement does state:

14 All sums set forth herein constitute damages on account
15 of personal physical injuries or sickness, within the
16 meaning of Section 104(a)(2) of the Internal Revenue Code
17 and physical injuries or physical sickness within the
18 meaning of Section 130(c) of the Internal Revenue Code.¹

19 Id. at p. 2-3.

20 Arch and Lexington jointly funded the settlement. Nine months
21 later, Arch brought this action for contribution against RSC, the
22 manufacturer of an engine degreaser, Gunk, that was also in the
23 Davidson vehicle at the time of the fire. RSC asserts that it was
24 not put on notice of the contribution action until Arch wrote RSC
25 a demand letter in August 2007, then filed this action on September
26 7, 2007. Xochihua Declaration ¶ 7.

27 Lexington is not a plaintiff in this case. Arch filed a
28 "Ratification" on October 1, 2007, stating that Lexington

¹ 26 U.S.C. § 104(a) provides that "gross income does not
include ... (2) the amount of any damages (*other than punitive
damages*) received ... on account of personal physical injuries or
physical sickness..." (Emphasis added)

1 authorized Arch to pursue the contribution "in its own name and for
2 its benefit as well as for the benefit of Lexington," and agreeing
3 "to be bound by the final determination in this case, and not to
4 bring any separate action in its own name and right" against RSC.

5 RSC seeks to make Lexington a plaintiff and have the
6 ratification stricken so that the claim is prosecuted by the real
7 party in interest.

8 Discussion

9 1. Defendant's motion to dismiss contribution and indemnity 10 claims for seeking to shift punitive damages

11 _____As a threshold matter, Arch asserts that RSC's motion to
12 dismiss the contribution and indemnity claims should be converted
13 to a motion for summary judgment because matters outside the
14 pleadings are part of RSC's motion. See Xochihua Declaration and
15 accompanying exhibits. I agree. Accordingly, RSC's motion to
16 dismiss is converted to a motion for summary judgment pursuant to
17 Rule 12(d) of the Federal Rules of Civil Procedure.

18 RSC asserts that because 1) the Davidsons were permitted to go
19 forward with a punitive damages claim; 2) the Davidsons amended
20 their complaint to allege that Arch marketed Sock-It with knowledge
21 that it was inherently unsafe, acted with conscious and reckless
22 disregard of risks to consumers, and with knowledge that safer
23 alternatives were feasible, but more expensive, and sought to
24 conceal the true risks of the product from the public; and 3) Arch
25 settled with the Davidsons a few months after the punitive damages
26 claim was asserted, the settlement with the Davidsons necessarily
27 included punitive damages. RSC acknowledges that Arch has denied

1 any part of the Davidson settlement was based on punitive damages,
2 but contends that Arch has never provided any factual support for
3 this position.

4 RSC contends that whatever part of the settlement was for
5 punitive damages cannot be shifted to RSC as a joint tortfeasor,
6 because, if it committed willful or wanton misconduct, Arch is
7 disqualified from invoking Oregon's comparative fault statute, Or.
8 Rev. Stat. § 31.600, and shifting liability for the punitive
9 damages portion of the Davidson settlement to RSC. RSC relies
10 primarily on Hampton Tree Farms v. Jewett, 158 Or. App. 376 (1999)
11 and Shin v. Sunriver Preparatory School, Inc., 199 Or. App. 352
12 (2005). In Hampton Tree Farms, the court held that willful
13 misconduct was "qualitatively different" from negligence, because
14 negligence "consists of a continuum of fault from simple negligence
15 through gross negligence to recklessness," and willful misconduct
16 "is not on that continuum." 158 Or. App. at 395. The court found
17 negligence and willful misconduct "not comparable" because willful
18 misconduct, unlike negligence, "involves a conscious decision to
19 act in a way that risks harm to another." Id. RSC argues that in
20 Shin, the court applied the analysis of Hampton Tree Farms to hold
21 that Oregon's comparative fault statute did not permit a comparison
22 between negligent and intentional tortfeasors. Id. at 372-77.
23 Consequently, RSC argues, only when two tortfeasors are each
24 ordinarily negligent may one be liable to the other for
25 contribution. RSC cites Jensen v. Alley, 128 Or. App. 673, 677
26 (1994), where the court held that only compensatory damages

1 exposure constitutes the "common liability" shared by tortfeasors,
2 while punitive damages address specific actions and motivations of
3 particular defendants, citing Hayes Oyster Co. v. Dulcich, 199 Or.
4 App. 43, 52 (2005). Hence, such "individualized" damages are not
5 part of any "common liability" that RSC shares with Arch.

6 RSC requests that Arch be required to prove what portion of
7 the settlement represents punitive damages so that they can be
8 segregated from the compensatory damages portion; if Arch is unable
9 to do so, RSC asks that this action be dismissed.

10 Arch counters that RSC's motion requires the court to
11 determine that, based on the evidence in the record, no reasonable
12 person could conclude anything other than that Arch was guilty of
13 intentional misconduct--when no such evidence exists.

14 First, Arch points out, there has been no finding or
15 adjudication that Arch was an intentional or willful tortfeasor--
16 only allegations by the Davidsons in the amended complaint.

17 Second, Arch argues that even if an allegation could
18 constitute an adjudication of liability for punitive damages, the
19 Davidsons alleged that Arch was liable for punitive damages because
20 of gross negligence or recklessness, not because Arch acted
21 intentionally or with malice. See Amended Complaint ¶ 15 (quoted
22 above). Arch points out that under Oregon law, punitive damages are
23 recoverable only upon a clear and convincing showing that the
24 defendant acted with conscious indifference to the welfare of
25 others and *either* malice or reckless and outrageous indifference to
26 a highly unreasonable risk of harm. Or. Rev. Stat. § 31.730(1). The
27

1 "malice" prong entails a showing of an "*intentional* doing of a
2 wrongful act, without just cause or excuse and with intentional
3 disregard of the social consequences." Blades v. White Motor Credit
4 Corp., 90 Or. App. 125, 130 (1998) (emphasis added). Arch contends
5 that the Davidsons elected to proceed under the "reckless and
6 outrageous indifference" standard, not "malice." See Amended
7 Complaint ¶ 15 ("Such acts were taken with *conscious and reckless*
8 *disregard* of these risks"). (Emphasis added) Consequently, says
9 Arch, a comparison of RSC and Arch's respective fault is
10 appropriate, since even gross negligence or recklessness permit
11 consideration of comparative fault.

12 Arch argues that in the absence of any proof or prior
13 adjudication of intentional conduct on the part of Arch, the Shin
14 holding is inapplicable to this case, and that the controlling
15 authority is DeYoung v. Fallon, 104 Or. App. 66, 70 (1990), holding
16 that the comparative fault statute applies in actions based on
17 negligence, and Hampton Tree Farms, 158 Or. App. at 395, holding
18 that comparative fault applies to situations where the defendant is
19 liable because of negligence, however aggravated.

20 Third, Arch asserts that RSC is wrong in its argument that
21 unless Arch can affirmatively prove that it acted only negligently,
22 it should be completely barred from pursuing contribution from RSC.
23 Arch contends that RSC has attempted to place on it the burden of
24 proving the *absence* of punitive damages from the settlement,
25 without citing any legal authority to that effect and contrary to
26 the principle that a plaintiff need not disprove an affirmative
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1 defense in order to survive summary judgment.

2 Arch takes issue with RSC's contention that the Davidson
3 settlement was "triggered" by the court's allowing the Davidsons to
4 pursue a claim for punitive damages. Arch characterizes this as
5 pure speculation on RSC's part, based on nothing more than temporal
6 proximity, because RSC has no way of knowing what "triggered" the
7 settlement.

8 Arch challenges RSC's alternative argument that the court
9 should require Arch to segregate the punitive damages component of
10 the settlement or suffer dismissal, arguing that there is no
11 **evidence** that any of the settlement proceeds represented punitive
12 damages. Arch directs the court to its interrogatory responses
13 ("none of the Davidson settlement amount was based on punitive
14 damages," Plaintiff's Response to Defendant's First Interrogatories
15 ¶ 4, attached as Exhibit B to Plaintiff's Response) and to the
16 Settlement Agreement itself, in which the Davidsons and Arch agreed
17 that the entire settlement was for personal injuries and excluded
18 punitive damages.

19 In reply, RSC challenges Arch's characterization of the
20 allegations in the Amended Complaint as not alleging intentional or
21 willful misconduct amounting to "malice" under Or. Rev. Stat. §
22 31.730. RSC first points out that Oregon does not draw a clear
23 either-or distinction between malice and recklessness. See, e.g.,
24 Linkhart v. Savely, 190 Or. 484, 505-06 (1951):

25 In civil cases malice has been held to mean the
26 intentional doing of [an] injurious act without
27 justification or excuse. A tort committed with a bad
motive or so recklessly as to be in disregard of social

1 obligations, or an act wantonly, maliciously, or wickedly
2 done, *is such a malicious act* as authorizes the awarding
of punitive damages.

3 (Emphasis added) RSC argues that paragraph 15 of the Davidsons'
4 Amended Complaint alleges the intentional doing of an injurious act
5 without justification or excuse, and also indicates intentional
6 conduct by Arch in the form of active concealment of the true risks
7 of its products to the public; the allegations therefore fall
8 within the Oregon Supreme Court's definition of "malice" in
9 Linkhart.

10 If it is established to the factfinder's satisfaction that a
11 portion of the settlement included punitive damages, that portion
12 is not available to Arch in its quest for contribution. This is
13 not an all or nothing proposition. As to the burden of proof on
14 whether the punitive damages are or were part of the settlement,
15 Arch's burden is to establish that some part of the settlement
16 represents damages for which contribution is available. Arch has
17 created an issue of fact precluding RSC from summary judgment
18 regarding any portion of settlement. It is likely they will get to
19 the jury on this issue, but that will have to await the trial.
20 Assuming RSC presents evidence that some portion of the settlement
21 was for punitive damages, the jury will have to decide what part of
22 the settlement did not involve punitives. It seems likely a jury
23 will conclude a significant sum did not. Whatever part, if any, the
24 jury cannot say more likely than not was for compensatory damages
25 and not punitive damages, they will need to exclude from any
26 contribution award they decide Arch is otherwise entitled to

1 receive.

2 In addition, RSC argues that the court's order allowing the
3 Davidsons to seek punitive damages was not based merely on the
4 Davidsons' allegations. Under Or. Rev. Stat. § 31.725(3), to assert
5 a claim for punitive damages, the Davidsons were required to submit
6 affidavits and supporting documentation setting forth specific
7 facts supported by admissible evidence adequate to avoid the
8 granting of a motion for a directed verdict. After considering the
9 evidence submitted by the Davidsons, the state court granted the
10 motion to amend the complaint. RSC argues that in so doing, the
11 court determined that there was sufficient evidence from which a
12 jury could conclude that Arch was liable for punitive damages; had
13 the case not settled, the issue of punitive damages would have gone
14 to the jury.

15 The procedural quirk of Or. Rev. Stat. § 31.725(3) does not
16 require the judge deciding the motion to make findings of fact
17 regarding liability for punitive damages. It is more akin to a
18 decision that there is a good faith basis for seeking punitive
19 damages at a preliminary phase of the case. Normally a defendant
20 does not marshal its proof against punitive damages at that time
21 for presentation to the court. The state court's decision to allow
22 the amended complaint seeking punitive damages is not in any way
23 predictive of whether the jury would in fact be presented with the
24 punitive damages claim during deliberations.

25 I am unpersuaded by RSC's arguments. The settlement agreement
26 itself provides no evidence that punitive damages were included in
27

1 the settlement amount. Both the Davidsons and Arch had motives for
2 settling the case on terms that did not include punitive damages.
3 Because Arch was not permitted to present contrary evidence at the
4 punitive damages hearing, the court's determination that there was
5 sufficient evidence to permit the Davidsons to amend the complaint
6 establishes nothing more than that the Davidsons' allegations were
7 made in good faith.

8 RSC's motion to dismiss, which the court has converted to a
9 motion for summary judgment, is denied. RSC's request that Arch be
10 required to segregate the settlement amounts or otherwise
11 demonstrate that some or all of the settlement agreement does not
12 represent punitive liability, is denied.

13 2. Defendant's motion to add Lexington as a plaintiff and
14 strike ratification

15 _____a. Joinder of Lexington

16 _____RSC moves the court to join Lexington as a party plaintiff
17 under Rule 19(a) of the Federal Rules and to strike the
18 ratification filed on Lexington's behalf by Arch. RSC asserts that
19 Arch and Lexington both qualify as parties needed for a just
20 adjudication, and that unless they are joined, RSC's ability to
21 defend against the contribution claim is substantially impaired
22 because RSC is deprived of the ability to prove up some equitable
23 defenses to contribution. Now that RSC has filed a withdrawal of
24 defenses (doc. # 141), only one separate affirmative defense is
25 proposed against Lexington, namely that it is subject to all
26 defenses against Arch.

27 ///

1 RSC seeks joinder under Rule 19(a)(1) of the Federal Rules of
2 Civil Procedure. As a threshold matter, Arch contends that the
3 motion is untimely, because the court previously set the deadline
4 for filing motions to amend a pleading to add a party or a claim as
5 February 1, 2008. Arch argues that the court should dismiss the
6 instant motion because it was brought over a year after the court-
7 ordered deadline. RSC responds that these motions are the result of
8 discovery late last year and early this year, so that RSC could not
9 have brought them before expiration of the deadline.

10 The parties agree that Lexington is a real party in interest
11 as defined by Oregon law, and that Rule 19 of the Federal Rules of
12 Civil Procedure governs the question of joinder.

13 As a general rule, joinder is approached on a case by case
14 basis. See, e.g., Provident Tradesmens Bank & Trust Co. v.
15 Patterson, 390 U.S. 102, 118 (1968) (court is to examine "practical
16 factors of individual cases" and resolve them "in the context of
17 the particular litigation").

18 Rule 19 provides as follows:

19 (a) Persons Required to be Joined if Feasible

20 (1) Required Party. A person who is subject to service
21 of process and whose joinder will not deprive the
22 court of subject-matter jurisdiction must be joined
23 as a party if:

24 (A) in that person's absence, the
25 court cannot accord complete relief
26 among existing parties; or

27 (B) that person claims an interest
28 relating to the subject of the
action and is so situated that
disposing of the action in the
person's absence may:

(I) as a practical matter
impair or impede the
person's ability to

1 protect the interest; or
2 (ii) leave an existing
3 party subject to a
4 substantial risk of
5 incurring double,
multiple, or otherwise
inconsistent obligations
because of the interest.

6 There is no issue that Lexington is subject to service of
7 process and that Lexington's joinder will not deprive the court of
8 subject matter jurisdiction. With respect to the "complete relief"
9 requirement, RSC contends that as part of its contribution defense,
10 it is entitled to have equitable affirmative defenses it possesses
11 against Lexington adjudicated by the trier of fact, and that
12 without this, RSC will be denied complete relief in contravention
13 to Rule 19(a)(1)(A).

14 Arch asserts that "complete relief" under Rule 19(a) does not
15 encompass defensive relief, and that Rule 19(a) does not permit
16 consideration of the potential unavailability of defenses in
17 determining whether "complete relief" can be afforded. Arch cites
18 a civil rights case from a district court in North Carolina,
19 Pettiford v. City of Greensboro, 556 F. Supp.2d 512, 517-18
20 (M.D.N.C. 2008) and cases cited therein. The Pettiford case is not
21 persuasive for several reasons. First, it does not stand for the
22 proposition that defenses cannot be considered on the Rule 19
23 requirement of complete relief. In fact, the Pettiford court noted
24 that "there is no precise formula for determining compulsory
25 joinder under Rule 19," and that "because the ultimate goal is to
26 achieve complete and effective relief, ... a few courts have held

1 that the term 'complete relief' incorporates the presentation of
2 defenses." 556 F. Supp.2d at 518. Second, none of the cases cited
3 in Pettiford is from this jurisdiction, and Pettiford is
4 distinguishable on both factual and legal grounds. Nor does it
5 appear, from the parenthetical explanations given by the court,
6 that any of the cases cited in Pettiford stands squarely for the
7 proposition that Rule 19(a) does not allow the court to consider
8 defenses when determining whether joinder is proper; rather, each
9 case seems to have been decided on its specific facts. The argument
10 that "complete relief" automatically precludes defenses is not
11 persuasive.

12 RSC's motion for to join Lexington as a plaintiff is granted.

13 b. Striking ratification

14 The issue presented by this motion is whether Lexington's
15 ratification pursuant to Rule 17(a) is a proper alternative to
16 joinder under Rule 19.

17 Rule 17 (a) (3) provides:

18 The court may not dismiss an action for failure to
19 prosecute in the name of the real party in interest
20 until, after an objection, a reasonable time has been
21 allowed for the real party in interest to ratify, join,
22 or be substituted into the action. After ratification,
joinder, or substitution, the action proceeds as if it
had been originally commenced by the real party in
interest.

23 The requirement of Rule 17 that an action be prosecuted in the name
24 of a real party in interest is based on the principle that the
25 pleadings "should be made to reveal and assert the actual interest
26 of the plaintiff, and to indicate the interests of any others in
27 the claim." United States v. Aetna Cas. & Sur. Co., 338 U.S. 366,

1 382 (1949) .

2 RSC asserts that the ratification by Lexington is inconsistent
3 with the "limited purpose" of ratification contemplated by Rule 17.
4 Although neither side cited authority from the Ninth Circuit in its
5 motion papers, ample authority from this jurisdiction limits the
6 applicability of ratification under Rule 17(a) to those cases
7 involving an understandable mistake. See, for example, Dunmore v.
8 United States, 358 F.3d 1107, 1112 (9th Cir. 2004) (ratification
9 under Rule 17(a) permitted so long as plaintiff's decision to sue
10 in his own name represented "an understandable mistake and not a
11 strategic decision"); Goodman v. United States, 298 F.3d 1048 (9th
12 Cir. 2002):

13 [The last sentence] in Rule 17(a) "is designed to avoid
14 forfeiture and injustice when an understandable mistake
15 has been made in selecting the party in whose name the
16 action should be brought." 6A Wright, Miller & Kane, §
17 1555 at 412; United States for Use and Benefit of Wulff
18 v. CMA, Inc., 890 F.2d 1070, 1074 (9th Cir. 1989) (stating
19 that "[t]he purpose of this portion of Rule 17(a) is to
20 prevent forfeiture of an action when determination of the
21 right party to sue is difficult or when an understandable
22 mistake has been made"). Wright & Miller further states
23 that "[a] literal interpretation of the last sentence of
24 Rule 17(a) would make it applicable to every case in
25 which an inappropriate plaintiff has been named." 6A
26 Wright, Miller & Kane, § 1555 at 415. However, the
27 treatise goes on to caution that "the rule should be
28 applied only to cases in which substitution of the real
party in interest is necessary to avoid injustice." Id.

See also 6A Wright, Miller & Kane § 1555, 415 ("[I]t has been held
that when the determination of the right party to bring the action
was not difficult and when no excusable mistake had been made, then
the last sentence of Rule 17(a) was not applicable..."); Wulff, 890
F.2d at 1075 (when plaintiffs knew they were not real party in

1 interest, "there was no difficulty and no mistake in determining
2 who was the proper party to bring suit."); Spangler v. Pasadena
3 City Bd. of Educ., 537 F.2d 1031, 1035 (9th Cir. 1976) (Last sentence
4 of Rule 17(a) "not applicable ... when there is no difficulty in
5 determining the right party to bring an action and when there has
6 been no excusable mistake made in selecting the party") (Wallace,
7 J., dissenting on other grounds); In re Phenylpropanolamine
8 Products Liability Litigation, 2006 WL 2316722 (W.D. Wash.
9 2006) ("The plain language of [Rule 17(a)] is broad, but courts have
10 imputed some limitation on its application. In particular, a
11 plaintiff must show that his decision to sue in his own name was an
12 understandable mistake," citing Dunmore at 358 F.3d at
13 1112) (internal quotation marks omitted).

14 Arch does not dispute that Lexington is a real party in
15 interest, and does not claim that it made a mistake by suing in its
16 own name. Since the circumstances permitting ratification under
17 Rule 17(a) are not present in this case, the ratification is
18 stricken.

19 3. Defendant's motion to amend answer and affirmative
20 defenses

21 RSC moves pursuant to Rule 15(a) to amend its answer and
22 affirmative defenses, based on information obtained in discovery
23 that additional defenses should be asserted against Arch and that
24 Lexington should be joined as a party so that RSC can assert other
25 affirmative defenses against Lexington. Most of these "other
26 defenses" have now been withdrawn (doc. # 141).

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1 Rule 15(a) provides that leave to amend a pleading "shall be
2 freely given when justice so requires." This rule represents a
3 "strong policy permitting amendment." Texaco, Inc. v. Ponsoldt, 939
4 F.2d 794, 798 (9th Cir. 1991). The liberality of the rule is
5 qualified by the requirement that the amendment not cause undue
6 prejudice to the opposing party, is not sought in bad faith, and is
7 not futile. Green v. City of Tucson, 255 F.3d 1086, 1093 (9th Cir.
8 2001). Thus, whether leave to amend should be granted is generally
9 determined by considering the following: 1) undue delay; 2) bad
10 faith; 3) futility of amendment; and 4) prejudice to the opposing
11 party. Lockheed Martin v. Network Solutions Inc., 194 F.3d 980, 986
12 (9th Cir. 1999).

13 Not all of the factors merit equal weight. Eminence Capital,
14 LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2002) (per
15 curiam). The consideration of prejudice to the opposing party
16 carries the greatest weight, and is the "touchstone of the inquiry
17 under Rule 15(a)." Id. at 1052. Absent prejudice, or a strong
18 showing of any of the remaining factors, there exists a presumption
19 under rule 15(a) in favor of granting leave to amend. Id.

20 Although delay is not a dispositive factor in the amendment
21 analysis, it is relevant, Morongo Band of Mission Indians v. Rose,
22 893 F.2d 1074, 1079 (9th Cir. 1990), especially when no reason is
23 given for the delay. Swanson v. United States Forest Serv., 87 F.3d
24 339, 345 (9th Cir. 1996). Where the legal basis for a cause of
25 action is tenuous, futility supports the refusal to grant leave to
26 amend. Morongo Band, 893 F.2d at 1079.

1 The proposed revised amended answer adds affirmative defenses
2 against Arch of 1) failure to apportion punitive and compensatory
3 damages in the Settlement Agreement; and 2) willful and wanton
4 misconduct in manufacturing, marketing and selling its CalHypo
5 product. The proposed revised amended answer asserts the following
6 affirmative defenses against Lexington: 1) failure to state a
7 claim; 2) preemption by federal law; 3) statute of limitations; and
8 4) defenses barring partial subrogee insurer are same as defenses
9 applicable to Arch.

10 First, Arch points out that the deadline for filing a motion
11 to amend a pleading to add a party or a claim was February 1, 2008.
12 This objection is obviated by RSC's contention that the motion to
13 amend is based on discovery obtained late in 2008 and early in
14 2009.

15 Arch asserts that it would "unquestionably be prejudiced" if
16 the court allowed RSC to amend its pleading 17 months after the
17 action was commenced and very shortly before discovery expires. But
18 the only actual prejudice Arch mentions is, first, that discovery
19 would again have to be extended, to allow Arch to discover the
20 basis of the newly asserted affirmative defenses, and, second, that
21 it is "self-evident" that there is a substantial risk of prejudice
22 to an insurer that is forced to join as a plaintiff, because the
23 presence of an insurer may affect a jury's decision on the merits,
24 citing Stouffer Corp. v. Dow Chemical Co., 88 F.R.D. 336, 338 (E.D.
25 Pa. 1980). I am unpersuaded that the extension of discovery would
26 prejudice Arch. I am not convinced the new defense against Arch

1 even requires much discovery not already in the hands of Arch. As
2 for the presence of an insurer tainting the jury's deliberations,
3 that is an issue that can be decided later in this litigation; the
4 jury does not see the pleadings, juries are sophisticated about
5 insurers, and potential prejudice can be addressed in the
6 instructions. Beyond a potential instruction, a real party in
7 interest cannot hide its own identity.

8 The motion to amend is granted.

9 **Conclusion**

10 RSC's Motion to Dismiss Contribution and Indemnity Claims
11 (doc. # 88) is DENIED. RSC's Motion to Add Lexington Insurance as
12 a Plaintiff and Strike Ratification (doc. # 91) is GRANTED. RSC's
13 Motion for Leave to Amend (doc. # 95) is GRANTED.

14 IT IS SO ORDERED.

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16 Dated this 30th day of June, 2009.

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19 _/s/ Dennis James Hubel
20 Dennis James Hubel
21 United States Magistrate Judge
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